Mobility/relocation cases present some of the most difficult challenges in family law. The impact on a child’s relationship with a parent can be dramatic, depending on the distances involved and the resources available for travel. The stakes are high for all parties in these cases. Parents often seek to move because of significant changes in their lives including job opportunities, new relationships or to be closer to extended family. However, the impact on the children involved has to be the primary focus of the Court. In order to understand the child’s perspective, it is essential that the Court have evidence about their views and preferences, where they can be ascertained. This evidence is critical to being able to assess how a move will impact the child’s relationships with their family members, their friends and community and how they may respond emotionally to their changed environment.

Children’s views are relevant to the best interests tests in both the Children’s Law Reform Act (CLRA) and the Divorce Act. Section 24 of the CLRA lists children’s views
and preferences as an enumerated factor to be considered. Section 16 of the Divorce Act does not specifically list the best interests test factors, however, a child’s views and preferences are equally relevant under this provision.

In mobility/relocation cases (referred to as relocation cases for the remainder of the paper), where decisions will impact more than just a child’s residence or access to a parent, there is a greater responsibility to understand a child’s perspective. As in other types of cases, children’s views and preferences are not determinative of the issue. The weight assigned to the views and preferences of a child will depend on the age, maturity and developmental level of the children and how their views fit within the consideration of other factors under the best interests test. However, they are an important consideration for the court and become more significant as a child gets older.

After briefly examining the test for relocation cases in Gordon v. Goertz, this paper will look at three main issues:

1. The changing landscape of children's views and preferences in Ontario;
2. The weight given to children's views in relocation decisions; and
3. The methods available in Ontario to ensure children’s views are in evidence before the Court.
Relocation Cases – The Test

*Gordon v. Goertz*

The leading case on relocation remains *Gordon v. Goertz*, decided by the Supreme Court in 1996. Justice McLachlin, for the Court, set out the factors to be considered on a relocation case:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child’s needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of a judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent’s views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider *inter alia*:
   (a) the existing custody arrangements and relationship between the child and the custodial parent;
   (b) the existing access arrangement and the relationship between the child and the access parent;
   (c) the desirability of maximizing contact between the child and both parents;
   (d) the views of the child;
   (e) the custodial parent’s reason for moving, only in the exceptional case where it is relevant to that parent’s ability to meet the needs of the child;
   (f) disruption to the child of a change in custody; and
   (g) disruption to the child consequent on removal from family, schools and the community he or she has come to know.

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Justice McLachlin summarized the factors by stating:

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child’s access parent, the extended family, and the community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?4

*Gordon v. Goertz* was an application to vary custody under the *Divorce Act*. However, the Ontario Court of Appeal has applied the test to variations under the *CLRA*.5 The Ontario Court of Appeal has also determined that where mobility issues are being determined on an initial application, the custody issue should be determined first and then the mobility issue should be determined in accordance with the factors outlined in *Gordon v. Goertz*.6

The considerations enumerated by the Supreme Court must be examined from the child’s perspective, not the parties. This is demonstrated by the factors that assess the impact of: disruptions to a child’s routines and community; disruptions to a child if a custody change is ordered; and the impact on the child’s relationships with their parents. In order to assess these issues in a meaningful way, the test also requires a consideration of a child’s views and preferences, where they can be ascertained.

The test as established by the Supreme Court of Canada is all-encompassing list of considerations that requires a factual assessment in each case. This can present significant challenges in advising clients on the possible outcome of these cases. As

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4 *Ibid*, para 49-50
discussed by Rollie Thompson in the article “Presumptions, Burdens and Best Interests in Mobility/relocation Law”, a factual assessment of best interests in each case has left little room for predictability in relocation cases. The recent article “Mobility: Beyond Gordon v. Goertz” provides a checklist that can be used when providing advice to clients about the likelihood of success in a relocation case, but, at the end of the day, it is the specific facts of the case that will often drive the result.

One of the many factual considerations that can have an impact on the direction of the case, although not referenced in the above noted checklist, is the views of the children involved. This paper will examine this consideration by discussing some of the changing perspectives on children’s views and preferences in Ontario, how views and preferences have been considered in mobility cases and finally, the options available to ensure that evidence of the children’s views and preferences are placed before the Court.

### Changing Approach to Children’s Views and Preferences in Ontario

View and preferences of children are an important consideration in any custody and access case in Ontario. However, two significant developments in the past year and a half have highlighted the importance of a child having a voice in decisions:

1. the incorporation of the *United Nations Convention on the Rights of the Child* (*CRC*) in Ontario’s new child protection legislation; and

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2. the recommendation from the Katelynn Sampson inquest to adopt Katelynn’s Principle as a framework to approach to all decisions made with respect to children.

While neither of these developments directly concern relocation cases, they may have an impact on how the courts and family law participants view a child’s participation in the decision making process.


Canada has been a signatory to the *United Nations Convention on the Rights of the Child* (CRC) since 1991. Article 3 of the CRC provides that decisions involving children should be made with the best interests of the child as the primary consideration, while Article 12 of the CRC outlines board participatory rights for children when decisions are being made about them. Specifically, Article 12 provides that a child who is capable of forming views has the right to express those views when decisions are being made that impact their lives. In 2009, the Supreme Court of Canada in *AC v. Manitoba (Child and Family Services)* described the CRC as a “framework under which the child’s own input will inform the content of the ‘best interests’ standard, with the weight accorded to these views increasing in relation to the child’s developing maturity.”

The CRC is now specifically referenced in the preamble to Ontario’s new child protection legislation, the *Child, Youth and Family Services Act*. The Act has received

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10 See link for full version of the new legislation: [http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4479](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=4479)
Royal Assent in Ontario and is expected to be proclaimed in the spring of 2018. The inclusion of the CRC in our child protection legislation indicates a significant commitment to ensure the principles in the CRC are applied to decisions made under the statute and indicates the increasing value our government places on children as independent rights holders.

The incorporation of the CRC in our child protection legislation was in large part driven by a specific recommendation from the 2016 Coroner's Inquest into the death of Katelynn Sampson, a seven year old girl who died in the care of a custodial non-parent. The jury also recommended that Ontario’s custody and access legislation, the CLRA, be amended to include a reference to the CRC, however, this has yet to occur. However, the decision to include the CRC in Ontario’s new child protection legislation may indicate a willingness to consider an amendment to the CLRA in the future. Again, including the CRC in the child protection legislation does it not mean that views and preferences will be determinative. As explained by the British Columbia Supreme Court in Beatty v. Schatz in the context of a Hague Convention Application:

> These day, and especially in light of article 12 of the United Nations Convention on the Rights of the Child, courts increasingly consider it appropriate to take account of a child’s views. Taking account does not mean that those views are always determinative or even presumptively so.

The incorporation of the CRC does however put a greater emphasis on the importance of considering children’s views and preferences.

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11 Beatty v. Schatz, [2009] BCJ No 1054 (BC Supreme Court)  
12 Ibid, at para 34 Upheld on appeal to the BC Court of Appeal at 2009 BCCA 310
Katelynn’s Principle

The second development in Ontario that may have an impact on how children’s views and preferences are considered also flows from the Katelynn Sampson inquest. The jury’s recommendations included a powerful statement directing how a child’s perspective should be considered in the context of all services, policies, legislation and decision making involving children. The jury adopted Katelynn’s Principle, defined as:

*Katelynn’s Principle*

_The child must be at the center, where they are the subject of or receiving services through the child welfare, justice and education systems._

A child is an individual with rights:

- who must always be seen
- whose voice must be heard
- who must be listened to and respected

A child’s cultural heritage must be taken into consideration and respected, particularly in blended families.

Actions must be taken to ensure the child who is capable of forming his or her own views is able to express those views freely and safely about matters affecting them.

A child’s view must be given due weight in accordance with the age and maturity of the child.

A child should be at the forefront of all service-related decision-making.

According to their age or maturity, each child should be given the opportunity to participate directly or through a support person or representative before any decisions affecting them are made.

According to their age or maturity, each child should be engaged through an honest and respectful dialogue about how/why decisions were or will be made.

Everyone who provides services to children or services that affect children are child advocates. Advocacy may potentially be a child’s lifeline. It must occur from the point of first contact and on a continual/continuous basis thereafter.  

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*See the Inquest Recommendations at:*  
[http://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCI
questsSampson2016.html](http://www.mcscs.jus.gov.on.ca/english/Deathinvestigations/Inquests/Verdictsandrecommendations/OCCI
questsSampson2016.html)
This principle is reflected in many of the new provisions in Ontario’s new child protection legislation. For instance, the best interests test in the CYFSA now includes a mandatory consideration of children’s views and preferences where they can be ascertained as opposed to a factor to be considered where the court determines they are relevant.\textsuperscript{14} As another example, the CYFSA includes a number of new provisions speaking to the rights of children receiving services, including: the right to express their own views freely and safely; the right to be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight; and the right to be consulted on the nature of the services provided and to participate in decisions and be advised of the decisions made in respect of those services.\textsuperscript{15}

While these changes are being recognized in Ontario’s child protection legislation, it will be interesting to see if similar amendments are made under the CLRA as recommended by the jury. In the meantime, the legislature has shown support for the concept that children should have a voice in decisions about their lives and should be afforded the ability to ensure that their voice is heard by decision makers. The weight assigned to those views and preferences by the Court will continue to depend on a number of factors, including age, maturity, independence and the extent to which the views correspond with other factors of the best interests test. However, the amendments to the CYFSA as a result of Katelynn’s Principle speak to an elevated level of youth

\textsuperscript{14} See the difference in wording between s. 37(3) of the current Child and Family Services Act and s. 74(3) of the new Child, Youth and Family Services Act

\textsuperscript{15} See section 3 of the new CYFSA in comparison to s. 103-108 of the CFSA.
involvement in decision making that may carry over to decisions being made about children in other areas of the law.

**Children’s Views and Preferences in Mobility Cases**

The need to consider a child’s perspective is particularly vital in relocation cases given that the outcome of the decision can impact every facet of a child’s life, including their residence and access arrangements, their relationships with extended family, their friends, their school and their community.

The British Columbia Court of Appeal in *Stav v. Stav* articulated the importance of considering children’s views in relocation cases specifically in light of their rights under the *Convention on the Rights of the Child*. In this case, the parties had a son who was almost 14 years old and twins who were 6 years old. The mother was granted permission to move with the children from Vancouver to Israel, which the father appealed. The Court of Appeal found that the trial judge failed to give appropriate weight to the older child’s views in reaching this decision. The Court stated:

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67  Article 12 of the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which was ratified by Canada in 1991, provides, in part:

1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

68  This right of the child is acknowledged in *Gordon v. Goertz*, which requires that the rights of the child be taken into account in mobility cases.
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69 The views of the twins, who were 6 years of age at the time of trial, were not solicited. It appears to have been accepted that they were too young to express a meaningful opinion as to their own best interests. It is noteworthy, however, that both parents described them as well and happy living in Vancouver.

70 Tomer’s views were solicited. The parties consented that this be done by having an independent lawyer meet with Tomer, who was then nearly 14 years of age. Tomer expressed a clear wish to remain in Vancouver and not to move to Israel. He was happy with his friends; with the high school he was attending, where he was on the honour roll; and with his extracurricular activities, particularly dragon boat racing, which he engaged in most days of the week.\textsuperscript{16}

The Court of Appeal held that the trial judge should have provided express reasons for making an order against the older child’s wishes, “so that Tomer (and Mr. Stav) could understand why Tomer’s views appeared to receive such short shrift.”\textsuperscript{17}

The Ontario Court of Appeal in \textit{Rushinko v. Rushinko} also identified the failure to consider the factors in the \textit{Gordon v. Goertz}, including children’s views and preferences, in a relocation case as a factor that justified appeal court intervention.\textsuperscript{18}

Yet, despite the above noted emphasis on the importance of the views and preferences of children in mobility disputes, a study in 2012 prepared for the Department of Justice by Nicholas Bala, et al. found that the wishes of children were only mentioned in about 25% of the reported cases between 2000 and 2010.\textsuperscript{19} In approximately a third of these cases, the children were ambivalent.\textsuperscript{20}

\textsuperscript{16} \textit{Stav v Stav}, 2012 BCCA 154 at paras 67-70, 2012 CarswellBC 938
\textsuperscript{17} \textit{Ibid} at para 76.
\textsuperscript{18} \textit{Rushinko v Rushinko}, 2002 CanLII 42032 at para 5, 27 RFL (5th) 173(ON CA).
\textsuperscript{19} Bala et al., Mobility/mobility/relocation Study, at ix – x.
\textsuperscript{20} \textit{Ibid}.
Bala found that where children expressed a clear view, judges tended to give considerable weight to their wishes. He reported that “in 94 of the 124 cases (76 percent) in which the children expressed clear views, the court’s decision accorded with those views.”

An interesting question for further research is what happened in the 75% of cases in which the views and preferences are not referenced. Is it because the Court was not provided with evidence of the views of the child and therefore could not consider them? Is it because the children were too young to be able to express their views and preferences? Or, is it because the views as put before the Court did not coincide with the Court’s determination of the child’s best interests and therefore no weight was placed on the views? Given the views and preferences of children are one of the enumerated factors in the test established by the Supreme Court of Canada and the fact that the decisions have such a significant impact on the children involved, it is surprising that so few cases reference the views of children.

**How does age impact the weight assigned to views and preferences of children?**

The age of a child will often be a relevant factor in the weight given to the views and preferences of a child in a decision. Consistent with other areas of law, the older the child the more weight that is placed on their views and preferences. Judges appear to give considerable weight to teenager’s wishes.

**(a) Weight placed on views of children over the age of twelve**

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21 *Ibid* at x.
22 *Ibid* at 35.
In Rollie Thompson’s 2011 review of mobility cases where one parent was seeking to move outside of Canada, he commented that it is not common to see older children as the subject of mobility court cases. He found the majority of cases involved younger children, however, where there was a child over the age of twelve, their preferences tended to drive the results.\(^\text{23}\)

In *Ibrahim v. Momin*, a 2011 decision of the British Columbia Supreme Court, Justice McKinnon emphasized the importance of following the wishes of two teenage children. The trial judge in the case had granted sole custody to the mother and removed mobility restrictions, so that she could move with the children to Texas. The father, who was unable to travel to the United States due to ongoing legal issues, appealed the decision. On the appeal, Justice McKinnon quoted from the trial judge, stating:

> The two children, Shezan and Natasha are now nearly 17 and 14. We are not dealing with infants nor young children. We are dealing with two young people who are educated and can clearly state their wishes, and they have done so on repeated occasions to various professionals and to this court. In brief, their wish is to have no relationship at this stage with Mr. Ibrahim. They do not wish to see him, do not wish to have access. They have stated that consistently and repeatedly throughout the course of these proceedings.\(^\text{24}\)

In *Mobbs v. Mobbs*, the Alberta Court of Queen’s Bench canvassed the views of a 14 year old child, but not his 6 year old sister. The Court stated,

> Their son is 14 years of age. He is of an age where his feelings should be considered in the decision-making process. Fourteen year old children do not have the maturity and insight to ultimately make decisions of this sort, but their feelings should be considered.\(^\text{25}\)

\(^\text{23}\) Rollie Thompson, “Heading for the Light: International Mobility/mobility/relocation from Canada” (2011) 30 CFLQ 1 at 8.


Later, Justice Sanderman reiterates that the son’s “thoughtful analysis deserves careful consideration by the court”\textsuperscript{26} and ultimately determines that it would be in his best interests to move with his mother and sister to Australia, in accordance with his wishes.

In \textit{Wilkinson v. Edward}, the Court ordered a change in custody so that a 12 year old child could remain with his father in Barrie, rather than move with his mother to Ohio. The parents also had a 14 year old son, whose decision to remain in Barrie the mother accepted without a Court order. In making the order, the Court followed the younger son’s expressed wish to stay in Barrie and remain with his brother and father.\textsuperscript{27}

In \textit{Liberati v. Liberati}, the Ontario Court of Justice followed the wishes of three children who “quite emphatically” wanted to return to their mother to France, rather than remain with their father in Canada.\textsuperscript{28} The Court put considerable weight on the views of the oldest child who was 14 years of age, despite significant concerns from the Court about the influence of their mother on the children’s feelings about their father.

In \textit{GA v. KB}, Justice Perkins of the Ontario Superior Court interviewed two children ages 15 and 13 about whether they preferred to move with their mother to Washington DC or remain in Toronto with their father.\textsuperscript{29} Justice Perkins describes his judicial interview with the children as follows:

\begin{quote}
After obtaining the assent of the parties, the Children’s Lawyer, and the children, I met with the children myself in order to do a final check on their wishes and preferences. I am very glad I did. I was able to see for myself what so many
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{26} \textit{Ibid} at para 13.
\item \textsuperscript{27} \textit{Wilkinson v Edward}, 2004 CanLII 22941 (ON SC), at paras 14-15, [2004] OTC 813.
\item \textsuperscript{28} \textit{Liberati v Liberati}, 2004 CarswellOnt 3718 at para 54, [2004] OJ No 3835.
\item \textsuperscript{29} \textit{GA v KB}, 2014 ONSC 3913 at para 40, 2014 CarswellOnt 8838
\end{itemize}
of the witnesses talked about — these children are delightful, as well as bright, appropriately mature for their ages, closely bonded to both parents and to each other, appreciative of the strengths and aware of the weaknesses of their parents, realistic in their appreciation of the issues affecting them, and willing to talk about their wishes and preferences.

41 The meeting took place with only their lawyer and court staff present. It was recorded, but I told the children the recording would not be released and their views would be kept confidential, unless they authorized me to communicate their views to their parents, which they did. I made it very clear that they were not to be the decision makers, that their wishes and preferences would be taken into account along with a lot of other information from the parents and others about what arrangements would be in their best interests, that I had to make the decision where they would live because their parents could not agree, and that my decision would be based on some legal considerations and on my appreciation of what was in their best interests.30

Justice Perkins found that the children “were very clear that they wanted to live with their mother”31 and he ultimately allowed the children to relocate to Washington in accordance with their wishes.

In BTO v. AA, the children’s views and preferences were uniquely put before the Court by a private lawyer who was retained to provide evidence as to the views of the children as opposed to providing legal representation. In this case, the mother applied for permission to move with her two children, ages 14 and 12, to Nigeria for two and a half years. The parents jointly obtained a private lawyer, Lauren Israel, to present the children’s wishes to the Court.32 Ms. Israel testified in the hearing that the children were clear that they wanted to go with their mother to Nigeria, rather than remain in Toronto.

30 Ibid at paras 40-41.
31 Ibid at para 42.
32 BTO v AA, 2013 ONCJ 708 at para 24
with their father. The Court granted the mother’s application and ordered access periods in accordance with the children’s expressed views on that subject as well.

(b) Children under the age of twelve

While older children’s views and preferences are given significant weight, there is considerable variation in the treatment of children’s views and preferences under the age of twelve. In many cases the views appear to be relied on when they correspond with what the Court determines is in the best interests of the children and carry little weight when they do not correspond.

Little weight given to views

In Decaen v. Decaen, the Ontario Court of Appeal upheld the decision of the trial judge who gave little weight to the views of 8 year old twins. In upholding the decision, the Court stated:

40 The trial judge considered the twins' views and preferences but "only to a limited extent". One reason for this was the twins' "young ages for reasons I probably do not have to expand upon" (at para. 165). The mother argues that the trial judge erred by not explaining why less weight should be accorded to the preferences expressed by young children.

41 We do not agree that the trial judge's failure to elaborate amounts to an error, but offer this further explanation. It is thought that the expressed preferences of young children are more likely to be fleeting, subject to external influence, and inconsistent with their actual best interests. A child's request to dine on candy alone is likely inconsistent with her best interests.

42 In assessing the significance of a child's wishes, the following are relevant: (i) whether both parents are able to provide adequate care; (ii) how clear and unambiguous the wishes are; (iii) how informed the expression is; (iv) the age of the child; (v) the maturity level; (vi) the strength of the wish; (vii) the length of time the preference has been expressed for; (viii) practicalities; (ix) the influence of the parent(s) on the expressed wish or preference; (x) the overall context; and

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33 Ibid at paras 70-76.
34 Ibid at para 124.
(xi) the circumstances of the preferences from the child's point of view: See Bala, Nicholas; Talwar, Victoria; Harris, Joanna, "The Voice of Children in Canadian Family Law Cases", (2005), 24 C.F.L.Q. 221. It is apparent that the trial judge considered all of these relevant factors.\(^{35}\)

A 2009 decision of the New Brunswick Court of Appeal took a similar approach. In *PRH v. MEL*, the Court overturned a trial level decision allowing relocation, in part based on too much weight being assigned to the stated views of the 9 year old child at issue. At paragraph 24, the Court states that "It also appears that the wishes of the 9 year old were given undue consideration, without first inquiring as to whether L. truly understood the ramifications of his requests."\(^{36}\)

In *LMS v. JDM*, the parties had two children aged 6 and 7. Justice Wolder held that: While the children are relatively young, I find that they were able to truly, consistently and emphatically articulate their views and wishes to Mr. Roy Reid, the social worker investigator assisting the children's lawyer.\(^{37}\) However, he gave "no weight to the children's stated indication that they wish to move to Alberta, since they are clearly caught between a desire to please their mother and to be able to see their father regularly."\(^{38}\)

In *Cozzi v. Smith*, the Court made an order that did not correspond to the views of an 11 year old boy’s desire to move with his mother to British Columbia.\(^{39}\) Justice McDermot stated:

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\text{[225] \hspace{1cm} And what of Micalister's views and preferences, the most concerning aspect of ordering Micalister to remain in Ontario with his father. A child’s views and preference do not govern; a child does not decide his fate, but has input only:}
\]


\(^{38}\) *Ibid* at para 60.

\(^{39}\) *Cozzi v Smith*, 2013 ONSC 3190, 2013 CarswellOnt 7887.
see, for example, Decaen v. Decaen, 2013 ONCA 218 (CanLII) at paragraphs 41 and 42. As with any considered move to another place far from home, parents would take into account their older children’s views and preferences; they would not necessarily govern. However, as with any 11 year old child, Micalister’s clearly expressed views and preferences are important to the result, and should only be overruled with caution.

[227] In any event, it is my determination that, although Micalister wishes to move with his mother, his views at this time are overridden by the other factors noted above, which lead me to determine that, at present, Micalister’s best interests would not be met by moving with Ms. Smith to Kitimat, British Columbia. Although his wishes are important, I must take into determination Micalister’s age and whether he understands the consequences of the move. And I also have to take into account whether some influence has been brought to bear, insofar as Micalister appears to have made an assumption somewhere along the way that he will be moving to Kitimat. I note that, at the date of trial, Micalister’s views had been canvassed only up to June, 2012, when the assessment was finished; the move itself had been placed before the assessor in November, 2011, approximately six months previous. There was no up-to-date evidence of Micalister’s views other than as expressed to the Applicant and his views may have changed since living at his father’s.40

Views of younger children given more weight

While many cases do not rely on the views and preferences of younger children, there are a number of cases in which the Courts show meaningful consideration of a child’s views and preferences in relocation cases.

In a 2014 decision, the Nova Scotia Court of Appeal rejected the argument that there was a particular age at which children’s views should be considered. In Parent v. MacDougall, the appellant father argued that since the children were nine and six years old when their views were canvassed, the judge should not have taken them into

40 Ibid at paras 225-227.
The father relied on the following passage from *Payne on Divorce* in support of this position:

The best interests of the child are not to be confused with the wishes of the child. Children's perceptions of their needs and best interests, including their views as to the parent with whom they wish to live, are matters which should be logically considered as falling within the perimeters of the children's best interests. When children are under nine years of age, courts do not usually place much, if any, reliance on their expressed preference for either parent. The wishes of children aged ten to thirteen are commonly regarded as an important, though not a decisive, factor in parental custody disputes. The wishes of the children increase in significance as they grow older. A court may refuse to interfere with the wishes of a child who is intelligent and who has developed an expressed valid reasons for any preference. In matters of both custody and access, the preferences of older children carry significant weight, even though the parents may have influenced their choices.  

The Court dismissed the father's argument that there was a particular age threshold for the weight given to a child's views. Justice Oland states that "each case and child is unique, and that it is for the judge to decide the weight to be given to the wishes of the children." However, the Court goes on to say that "Nothing in the decision under appeal indicates that the determination of the best interests of the children was influenced unduly, or at all, by his references to their stated preference."

There are also many cases where the Court has relied to some extent on the views and preferences of a younger child. For instance, in *Prokopchuk v. Borowski*, Justice Quinlan of the Ontario Superior Court considered the stated preference of a 6 year old

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41 *Parent v MacDougall*, 2014 NSCA 3 at para 30.
43 Ibid at para 34.
44 Ibid at para 34.
child to move from Ontario to Alberta with her mother. In addressing her views, Justice Quinlan stated:

[130] Tatyana is not too young to be heard. There is no “magic age” at which a child’s wishes are entitled to some deference. I have considered that Tatyana is a bright little girl, who clearly and consistently provided her views to Ms. Chouinard. When Ms. Chouinard told her that her role was that of someone who helps moms and dads make plans for their children, Tatyana spontaneously and emphatically explained that she wanted to live with her mother and sister in the west. Tatyana told Ms. Chouinard that she had always lived with and been cared for by her mom and that she was used “to living with her mommy all the time and visiting with her dad”. She wanted Ms. Chouinard’s help so that “it could be like that again”.

[132] Although Tatyana was young when she provided her views to Ms. Chouinard, I feel that some consideration should be given to her views. The *Children’s Law Reform Act* mandates that the court consider all the child’s needs and circumstances including the child’s views and preferences, if they can reasonably be ascertained. In this case, they can be reasonably ascertained and I find I should give them some, although not significant, consideration.

Similarly, in *Pike v. Cook*, Justice Hackland gave considerable weight to the preference of a nine year old boy to move back to Cornwall, Ontario to live with his father after his mother moved with him to Philadelphia pursuant to an interim order. Justice Hackland stated:

[24] Jeremy’s wishes are deserving of considerable weight. He is a very intelligent and articulate nine year old who is deeply committed to both parents. He desperately wants to see more of his father. He wishes to return to Cornwall which he considers his home and where his support network exists. Alternate weekend access in Philadelphia is not to Jeremy’s liking and is not meeting his needs. I agree with Dr. Weinberger that the current situation has resulted in a diminution of the quality of Jeremy’s access with his father and I also agree with him and with counsel for the Children’s Lawyer that the ideal situation in terms of Jeremy’s interests would be for Ms. Cook to obtain employment in the Cornwall area and return with Jeremy.

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In *Roberts v. Roberts*, Justice Klein of the Ontario Court of Justice considered an application of a mother to move from North Bay, Ontario to Thompson, Manitoba with two children ages 8 and 12.\(^{46}\) The evidence before the Court was that the children “were clear in their strong preference to remain in the care and custody of their mother and could articulate the reasons therefore.”\(^{47}\) In determining the children’s best interests, Justice Klein gave considerable weight to their expressed views. He states that “the disruption to the children by removing them from their family, i.e. mother’s home, through a change in custody in the face of their clearly and strongly expressed wishes would be nothing less than catastrophic under those circumstances.”\(^{48}\)

**(c) Differing views among siblings**

An assessment of the individual best interests of each child in a family can sometimes yield different results for siblings. There are examples of cases where the Court has allowed the relocation of one child, but not another in the same family, in accordance with their views. These cases are notable when considering how the expressed wishes of the child may shape the outcome of the case or where the views of a younger child may not be given as much weight as the views of an older child.

In *Albavera v. Alarcon* (Alberta Queen’s Bench), the mother sought permission to relocate with her two children to Mexico, as she had no immigration status in Canada. The children

\(^{46}\) *Roberts v Roberts*, 2012 ONCJ 660, 2012 CarswellOnt 13229.

\(^{47}\) *Ibid* at para 9.

\(^{48}\) *Ibid* at para 11.
had status under their father’s work visa. The two children were ages 16 and 10. Justice Lee allowed the relocation of the 10 year old child with the mother, but found that the 16 year old daughter would remain in Canada with her father, stating that “it seems that the oldest child has already made her choice and wishes to remain in Canada where she has been for the past five years.” 49 Justice Lee states that “The 10 year old son is not old enough, unlike his older sister, to decide where he wants to live.” 50

*McIntyre v. Veinot*, a decision of the Nova Scotia Supreme Court, concerned three children, a son, age 13, and two daughters, ages 12 and 10, at the time of the hearing. 51 The eldest child was autistic. The parents had joint custody and the children alternated weeks with each parent. The father lost his job in Nova Scotia and had found new employment in Olds, Alberta. He applied for sole custody of all three children and for their primary residence to be with him in Alberta. Ultimately, the Court found that it was in the son’s best interests to remain with their mother, while daughters moved with their father. This was in accordance with the expressed wishes of the two daughters. The Court states, “although the wishes of the children is but one factor to take into account in determining their best interests, in this case, the children’s wishes and the children’s best interests ‘lead me to the same result’.” 52 However, it is worth noting that it does not appear that the Court attempted to canvass the opinion of the eldest son, nor give it any weight.

Finally, in *Hurley v. Hurley*, another decision of the Nova Scotia Supreme Court, at issue was whether a 13 year old son would move with his father to Calgary. The parents also

50 Ibid at para 15.
51 McIntyre v Veinot, 2016 CarswellNS 9, 2016 NSSC 8.
52 Ibid at para 414.
had a 15 year old daughter, who expressed that she wished to remain in Nova Scotia, which both parents accepted. The Court followed the son’s expressed wish to move with his father, in large part so that he could attend an elite private sports school in Calgary. The Court described him as having the maturity of a 14 or 15 year old, and stated that “It is unlikely the Court would be asked to decide on his relocation if Jacob was 15 years of age. Most parents would accept the judgment of a 15 year old in these circumstances.”

**Interesting Child Focused Decisions from UK on Mobility**

While not decided in a Canadian jurisdiction, there are two cases from the United Kingdom on the issue of the weight to be given to the views of a child in a relocation case that are worth noting.

The England and Wales Court of Appeal decision *In the Matter of W (Children)* emphasizes the importance of giving weight to children’s wishes in the context of mobility decisions, particularly where they are older. The Court states that:

33 The participation of children in private law Children Act proceedings is a matter of particular topical concern. The Family Justice Council has created a sub-committee, “The Voice of the Child”, to advise government and to stimulate professional debate as to the way forward. As a generalisation it can be said that the committee is strongly in favour of judges seeing children much more frequently than has been our convention. This case well illustrates the argument. J in particular, at nearly 15 years of age, would in another context be judged Gillick competent. She is an autonomous person with clear rights. If major issues are to be decided, determining the whole course of her remaining minority, she is at a minimum entitled to be heard. That can be achieved in three ways; separate representation, discussion with the judge or through a CAFCASS intermediary. Each of these methods has different advantages and disadvantages. The one selected in the present case has the obvious disadvantage that at the conclusion of the process J can only feel that her wishes and feelings were insufficiently

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considered by the judge because they were diminished by the very professional whom she trusted to advance them. This conclusion might have been avoided had the judge had a meeting with the children, and particularly with J. He suggested that course and, in my judgment, it is regrettable that he was dissuaded from it.

34 Thus my conclusion is that the wishes and feelings of the children were plain enough and the judge should have given them greater weight.  

In contrast, the recent decision of Justice Peter Jackson of the England and Wales Family Court in *Re A (Letter to a Young Person)* provides a notable example of child-focused decision-making, even where the outcome does not mirror the child’s stated preferences. The decision takes the form of a letter addressed to the 14 year old boy at the centre of the case. Justice Jackson decided against the young person’s stated preference to move to Sweden with his father. In age-appropriate language, he explains in great detail that, despite giving weight to the child’s views, he was unable to make the order that the child requested. The case demonstrates how courts may take a child’s views and preferences into account in a meaningful way, even where the views do not dictate the ultimate outcome.

**Concluding thoughts on the impact of views and preferences in relocation cases**

A child’s age has a significant impact on the outcome of relocation cases for older children. If a child over the age of twelve has strong and independent views and preferences, the outcome will most likely be consistent with those views and preferences. However, the outcome is not as clear for children under the age of twelve.

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54 *In the Matter of W (Children)*, [2008] EWCA Civ 528, 2008 WL 2033501 at paras 33-34.
where the result seems to depend on how the child’s views and preferences intersect with the other factors in the best interests test.

In cases where views and preferences can be ascertained, it is important to ensure those views are given due consideration by the Court, so that a child’s perspective is considered in the final decision. However, due consideration is not, and should not be equated with, blindly following the views and preferences of children. The hope is that children’s voices and perspectives will be consulted in a meaningful way and that the Court will have the opportunity to hear, from the child’s perspective, how they would be impacted by the different plans before the Court. That perspective may include a child indicating that they do not want to express a view, but the point is that they have been consulted. Given the results of the Bala study showing that children’s views were only referenced in 25% of relocation cases reviewed, it is important to understand what is happening in the other 75% of cases and, in situations where those views can be ascertained, ensure those children are given the opportunity to offer their perspective.

### Options for Obtaining the Views and Preferences of Children

If we accept that children’s views and preferences are a significant consideration in relocation cases, the question then becomes how those views can be placed before the Court. In some cases, those views may be well known and agreed upon by all parties. However, there are often nuances to children’s views that are not necessarily available
to decision makers when parents/parties are solely responsible for the child’s views being conveyed to the court.

What methods should be used for these purposes? Views of children can be admitted through hearsay evidence of third parties such as therapists, teachers, or other professionals who are working with the child when the statements are either an exception to the hearsay rule or meet the test of necessity and reliability. However, given the wide-ranging impact of decisions on relocation cases, it would be important that the views are provided in the context of the child understanding the different plans before the Court. In Ontario, we have a number of additional options available to the Court and families to facilitate a consideration of children’s views and preferences:

- a custody and access assessment;
- a section 112 Report by the Office of the Children’s Lawyer (OCL);
- legal representation of the child;
- a Views of the Child Report; or
- in rare cases, direct evidence from the children.

Custody and access assessments

An assessment ordered under section 30 of the CLRA can provide a comprehensive examination of family dynamics, assess how different plans relate to the best interests of the children, and should include any views and preferences of the children involved. In a relocation case where a move may impact schooling, friends, extended family, and medical care, in addition to the relationship with one of the parties, an assessment can
provide considerable information to assist the parties and a Judge in making an informed decision as to what is in the best interests of the child.

However, this option is only accessible to families who can afford a private assessment. It is also an intrusive process that parents may not want to undergo or have their children undergo. Finally, it is not a quick option. Assessments, depending on their scope, can take a significant amount of time to complete and often there are time pressures involved in these cases, such as wanting a decision before the beginning of a new school year.

**Section 112 reports**

Section 112 of the *Courts of Justice Act* provides jurisdiction for the court to request the Office of the Children’s Lawyer (OCL) to investigate and report on the custody and access issues before the Court. The OCL has the discretion as to whether or not they will accept the file and whether it will be assigned to a lawyer or clinician. Typically, children under the age of 8 will be assigned to a clinician to complete a s. 112 Report, although each case is assessed on an individual basis.

Section 112 reports are due 90 days after they are accepted and assigned by the OCL. These reports are completed at no cost to the parties. They provide a factual overview of the custody and access issues impacting the children and the clinicians make specific recommendations to the Court. While the reports are due within 90 days, it will take longer from the date of the order to receive the report, as it can take several weeks to over a month from the time an order is made to assignment of the file. While the reports will include information about a child’s views and preferences if they can be ascertained,
the reports are typically assigned for families with younger children and therefore many of the children may not be at an age where they can express views and preferences.

**Legal Representation**

In Ontario, legal representation of children in custody and access disputes is generally provided through the Office of the Children’s Lawyer, although there are some cases where children are represented by privately retained lawyers.

As with the appointment of an OCL clinician under s. 112 of the *Courts of Justice Act*, a Court can request the involvement of the OCL, and the OCL has discretion to determine whether the office will accept the file and what type of service will be provided. If the OCL accepts the file as a legal file under s. 89(3.1) of the *Courts of Justice Act*, a lawyer will be assigned and in many relocation cases a clinician will be assigned to assist the lawyer in their legal representation of the child. If a lawyer is assigned to the file, he or she will take a position consistent with the views and preferences of the children, provided the views are strong, consistent and independent. The clinician will be available to provide evidence of the children’s views, to the extent that the children wish the views to be shared with the court, while the lawyer is able to advocate that position throughout the court proceeding.

**Views of the Child Reports**

Views of the Child Reports are a relatively new method of obtaining views and preferences of a child in Ontario, although the Reports are available in a number of provinces across Canada. While the format of these Reports varies, they essentially involve two meetings with the child following which the views of the child and their
perspectives are conveyed to the Court through a Report without any accompanying recommendations or collateral information. There are clinicians in Ontario who have completed Reports privately; however, a recent pilot project created a standardized process to obtain the Reports and training process for clinicians. The provincial pilot project ran from May 2016 to January 2017 and researched the use of Views of the Child Reports in 11 pilot sites across Ontario. Children had to be 7 or older to participate in the pilot. In June 2017, a summary of the data obtained from the pilot project was released and it provided generally positive reactions from parties, children and Judges. 56 The Reports were completed and filed with the Court within thirty days of the order being made, making timeliness one of the significant advantages.

A list of factors was developed for the Court to consider before making an order for a Report. The list referenced relocation cases in circumstances where an independent report of the children’s perspectives and preferences was not otherwise available. 57 However, depending on the move proposed and the distances involved, these cases may require more than two interviews with children to accurately understand a child’s perspective on issues ranging from custody and access, to separation from friends and extended family, to changes in extracurricular activities and community. However, if there are discrete issues that need to be canvassed with a child, there may be a role for a Views of the Child Report in a relocation case.

The pilot project is now completed in Ontario. The project recommended that the Reports be included in the services offered by the OCL, however, at this point in time

57 Ibid, p. 12
they are not available through the OCL. However, clinicians are able to complete the Reports on a private basis in Ontario.\textsuperscript{58}

\textbf{Direct Evidence from Children}

While children giving evidence in family law proceeding is very rare, there are occasions where Courts have conducted judicial interviews with children. Earlier in the paper, we referenced the case of \textit{GA v. KB}, in which Justice Perkins conducted a judicial interview of two children ages 15 and 13 in a relocation case for the purpose of “a final check on their views and preferences”.\textsuperscript{59}

Judicial interviews are referenced in section 64 of the \textit{CLRA}, which provides:

\begin{quote}
\textbf{Child entitled to be heard}
64. (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.

\textbf{Interview by court}
(2) The court may interview the child to determine the views and preferences of the child.

\textbf{Recording}
(3) The interview shall be recorded.

\textbf{Counsel}
(4) The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.
\end{quote}

The Advocates Society and AFCC jointly sponsored a comprehensive review of judicial interviews and proposed guidelines for the use of judicial interviews in family law cases. In 2013, they released a document entitled “Guidelines for Judicial Interviews and Meetings with Children in Custody and Access Cases in Ontario.” \textsuperscript{60} The guidelines

\textsuperscript{58} \textit{Ibid}, p. 39

\textsuperscript{59} \textit{GA v. KB}, at para 40

distinguished between interviews, in which the purpose was to gather information about a child’s views and preferences, and meetings, in which the purpose was to explain issues, such as the decision of the court, to the child. The report also set out guidelines to identify circumstances in which an interview may or may not be appropriate.61

In addition to the identified concerns and cautions raised in the report, judicial interviews in relocation cases may be challenging given the breadth of issues that need to be canvassed with a child. Children who do not have legal representation or other professionals working with them may not even be aware of the specifics of the plans being proposed and that would need to be explained before any informed views and preferences could be obtained. One interview may not provide the child with the opportunity and time to think about the issues raised and respond with the level of perspective that others in the process have been afforded. However, judicial interviews are an option available if there are no other mechanisms to obtain the child’s views.

Summary

It is important that children’s perspectives are considered by the Court in relocation cases. Consideration of a child’s perspective involves more than listening to parties and other professional’s views of what is best for the child. Given the broad reaching consequences in relocation cases, it is important for children to have a voice in these

61 Ibid, p.9-11
decisions and to be consulted about the various plans before the court. There are a variety of mechanisms available in Ontario to obtain this evidence so that Courts are able to incorporate children’s views when applying the Gordon v. Goertz factors in any given case. Unless a child's views cannot be ascertained due to chronological or developmental age, they should form part of any analysis in a relocation case. As Ontario moves towards including children in a more meaningful way in decision-making in child protection cases, it will be interesting to see whether a similar approach will be taken in custody and access files, with or without supporting legislative changes.